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No. OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1997

NORMAN LEATH,

Petitioner,

VS.

AMERICAN MEDICAL INTERNATIONAL INCORPORATED,

Respondent.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should a unilaterally imposed arbitration agreement by an employer which makes agreement with it a condition of future or continued employment, be considered a voluntary and knowing waiver of an employee's right to choose to have his statutory rights judicially determined; or put another way, should an employer be allowed to terminate or withhold employment solely because an employee refuses to agree to enter into an arbitration agreement?

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Petitioner, Norman Leath (hereinafter "Leath"), respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is not published, however, a true and correct copy of the opinion is set forth in Appendix A. The opinion and judgment of the district court in *Norman Leath v. American Medical International Incorporated*, Civ. No. 3:95-CV-818-D was entered on July 10, 1996. True and correct copies are set forth in Appendices B and C.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") was entered on August 28, 1997.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The particular statutory provision applicable herein is as follows:

> [A] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or

> transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Federal Arbitration Act, 9 U.S.C. s. 2.

STATEMENT OF THE CASE

The fundamental question in this case is whether an employer can force an employee to agree to arbitrate his statutory employment rights under Title VII, or the like, by unilaterally making agreement to an arbitration agreement covering all employment disputes a condition of future or continued employment? It is argued the answer should be in the negative since it would seem clear that an employer would not have the right to terminate an employee for refusing to agree to arbitrate his statutory rights. This would be retaliation against someone participating in a protected activity, i.e., chosing judicial determination of his statutory rights over arbitration. It follows that the employee must be left with a true choice as to whether he wants to arbitrate or not, before it can be said he has voluntarily waived it. An employer should not be allowed to economically coerce an implied or express agreement to arbitrate by unilaterally requiring the agreement to arbitrate as a condition of continued employment. Such a coerced agreement would not be voluntary in any sense of the word as would be required before an arbitration agreement would be enforceable. This would be true whether the employee evidenced his agreement by actually signing the agreement under the employer's threats of termination or simply continued to work for the employer without signing the agreement nor voicing his refusal to agree. Likewise, because the employer could not terminate an employee simply for refusing to agree to arbitrate his

statutory rights as a condition of continued employment, the fact an employee might continue to be employed after the unilateral imposition of the arbitration agreement can not serve as consideration. Before employment can be considered legal consideration, the employer must have the right to withhold it in the event the employee does not agree to arbitrate his statutory rights. While an employer might have the right generally to hire or terminate at will, it may not do so solely because an employee choses to keep his right to judicial redress of his statutory rights, or otherwise engage in protected activities. Before an arbitration agreement can be enforceable within an employment contract, the employee must have been offered something more then future or continued employment, and his acceptance should not have been obtained through economic coercion.

A. STATEMENT OF FACTS

On March 22, 1993, Leath signed a form on which he agreed to arbitrate any disputes arising out of his employment or the termination of his employment. (R. at 21). Specifically, the agreement stated the following:

> I understand AMI makes available for resolution of grievances. I also understand that as a condition of employment and continued employment, I agree to submit any complaints to the published process and agree to abide by and accept the final decisioin of the arbitration panel as ultimate resolution of my complaint(s) for any and all events that arise out of employment or termination of employment.

> If a state has established an arbitration procedure, [American] and the employee will comply with the statute requirement.
>
> (Signature required as a condition for new employees).

(R. at 21).

B. COURSE OF PROCEEDINGS AND OPINIONS

On April 28, 1995 Leath filed suit in the Northern District Court of Texas, Dallas Division, alleging he had been wrongfully terminated from his employment with American in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000-e *et seq.* and 42 U.S.C. Sec. 1981. (R. at 1-9). On August 23, 1995, American filed its Answer. (R. at 10-14). On September 26, 1995, the parties filed an Agreed Motion to Stay Court Proceedings Pending Arbitration pursuant to an arbitration agreement that had been signed by Leath during his employment. (R. at 18-20). It was expressly agreed by the parties in that motion that by agreeing to submit his claims to arbitration at that time, Leath was not waiving his right to contest the enforceability of the arbitration agreement or the binding nature of any arbitration award that might be rendered. (R. at 19). This motion was granted on September 28, 1995. (R. 21-22). On October 23 and 24, 1996, Leath's claims were arbitrated and an award was entered against Leath, and on December 13, 1996, American filed a Motion to Confirm Arbitration Award and Dismiss. (R. at 24-28). On January 6, 1997, Leath filed his Response to American's Motion to Confirm. (R. at 32-47). On January 21, 1991, American filed its Response and Reply Brief in Support of its Motion to Confirm. (R. at 48-82). On

January 24, 1997, the District Court rendered its Memorandum Opinion and Order, confirming the Arbitration Award, and entered Judgment against Leath finding he had failed to show any evidence of the absence of voluntary consent. (R. at 83-85). On February 24, 1997, Leath filed notice of appeal. (R. at 86). The Fifth Circuit Court of Appeals rendered its decision on August 28, 1997, affirming the District Court's decision

REASONS FOR GRANTING THE WRIT

THE QUESTION PRESENTED IS IMPORTANT AND HAS NOT BEEN DIRECTLY ADDRESSED BY THIS COURT BEFORE.

Leath concedes that an employee may under the appropriate circumstances voluntarily and knowingly agree to an arbitration agreement which would be enforceable under the Federal Arbitration Act. 9 U.S.C. s. 1 *et seq.* Nevertheless, he would also argue it was Congress's intent in the case of statutory rights such as those protected by Title VII, and the like, that such arbitration agreements would only be enforced where appropriate and to the extent authorized by law, and then only where the parties **knowingly and voluntarily** elect to use this method. *See Alexander v. Gardner-Denver*, 45 U.S. 36, 39 L.Ed.2d 147, 94 S.Ct. 1011, 1019-1020 (1974); *Gilmer v. Interstate/Johnson Lang Corporation*, 500 U.S. 20, 114 L.Ed.2d 26, 111 S.Ct. 1647, 1659 (1991)(citing 9 U.S.C. s. 2 and *Mitsubishi Motor Corp. v. Soler Chysler-Plymouth, Inc.*, 473 U.S. 614, 627, 105 S.Ct. 3346, 3354, 87 L.Ed.2d 444 (1985)(overwhelming economic power would provide grounds for the revocation of arbitration agreement)); *Prudential Ins. Co of America v. Lai*,

42 F.3d 1299, 1305 (9th Cir. 1994)(quoting 137 Cong. Rec. S. 15472, S. 15478 (Dailey Ed. Oct. 30, 1991) - statement of Senator Dole about when Title VII would allow binding arbitration only when the agreement is entered into knowingly and voluntarily); *Lang v. Burlington Northern Railroad Co.*, 835 F. Supp. 1104, 1106 (D. Minn. 1993)(citing Civil Rights Act of 1991, Pub. L. No. 102-106, Sec. 118, 105 Stat. 1071 (1991) - use of arbitration encouraged where appropriate and to the extent authorized by law)).

As such, it becomes clear not every arbitration agreement between an employer and an employee will be enforceable as to the employee's statutory rights regardless of the circumstances under which the arbitration agreement was entered into. If such grounds exist under law or in equity for the revocation of the agreement, then such an agreement would not be binding as in the case of any other contract. *See Gilmer*, 111 S.Ct. at 1656. It is argued herein that when an employer unilaterally makes future or continued employment conditional on an employee's agreement to arbitrate his statutory rights without further consideration being given, said arbitration agreement is not enforceable as a matter of law. Under these circumstances there is no binding contract to arbitrate since there was no voluntary acceptance and no legal consideration to support it. To say otherwise, is to say, an employer has the right to terminate or refuse to hire simply because an employee chooses not to agree to arbitrate his statutory rights.

This Court has not directly addressed these specific legal arguments or facts in the past, although it has without considering the arguments herein considered the question of whether an arbitration agreement was possible within an employment contract. This Court has not specifically held an

employer can terminate an employee if that employee refuses to enter into an arbitration agreement as a condition of his employment, but its prior rulings are being used as a basis for arguing it has. This interpretation will have wide repercussions which it is believed this Court did not intend. For these reasons the questions presented are important and worthy of this Court's consideration.

Several courts have supported the contention that an employer may unilaterally impose an agreement to arbitrate upon an employee under threat of termination, and that the employee's continued employment constitutes acceptance of, as well as, consideration for the agreement. *See, e.g., Kinnebrew v. Gulf Ins. Co.*, 67 FEP Cases 189, 191 (N.D. Tex. 1994); *Cole v. Burns Int'l Security Services*, 105 F.3d 1465, 1482 (D.C. Cir. 1997); *Reese v. Commercial Credit Corp.*, __ F. Supp. ___, 1997 WL 85786 (D.S.C. Fed. 27, 1997); *Lang v. Burlington Northern Railroad Co.*, 835 F.Supp. 1104, 1106 (D. Minn. 1993).

These cases seem to be premised on the generally accepted principle that an employer may usually impose whatever conditions he wants on his employees as conditions of their employment.

Leath concedes this reasoning would hold true with regard to most unilaterally imposed policies; however, it is questioned here whether such would be true if the policy the employer seeks to unilaterally impose is itself violative of the law. For example, an employer should obviously be able to require its employees to maintain certain standards of conduct or performance. It may set specific schedules or tours of duty, it may place certain restrictions on overtime, it can set specific rates of pay, it may require certain forms of dress, and

if the employee remains it will be said he has accepted said offer of employment under those conditions. But, what if an employer insists an employee work for below minimum wages, that the employee work under unsafe conditions, or that they submit to discriminatory practices? These conditions of employment are obviously not allowed to be terms of an employment contract, notwithstanding an employer's generally accepted right to unilaterally impose whatever policies it wants on its employees, because they are in and of themselves prohibited by law. No matter how many times an employee allowed himself to be a target of a racial slur without complaining, it could never be argued he had consented to such conduct as a condition of his employment simply because he accepted employment aware of the racial slurs or did not quit but instead continued to suffer the racial slurs. The mere fact that an employment relationship may be at-will should not automatically mean an employer should be allowed to unilaterally impose illegal conditions of employment without impunity even if the employee voluntarily accepts employment under those conditions and remains at work for a period of time before complaining about them.

Leath would contend that an employer can not unilaterally impose an arbitration agreement covering the employee's statutory rights as a condition of employment, because it would be illegal retaliation under Title VII, and the like, for it to terminate an employee who refused to agree to arbitrate his statutory rights as a condition to his employment. The right to seek relief for the violation of a statutory employment claim through the judicial system should itself be considered a protected activity under Title VII, and the like. True the right to judicial redress may be legally bargained away, this does not mean in turn that an employer should

have the right to unilaterally force its employees to agree under threat of losing their job to give up this right. There is nothing voluntary about this sort of agreement. It would be illegal discrimination or retaliation for an employer to force an employee to agree to arbitrate rather then litigate his statutory claims under threat of termination or denial of employment since there is no true option of refusing to agree which would enable him to continue to work. The entire employment contract improperly becomes conditional on the compulsory agreement to arbitrate, depriving the employee of any choice in the matter, and substantially interfering in his statutory right to voluntarily choose between seeking redress through the courts or through arbitration. Instead he is forced to chose between arbitration or no employment at all. This is so clearly different, for example, then an employer requiring an employee work a certain number of hours of overtime which it has every right to compel as a condition so long as it properly pays the employee. There is nothing else to consider when an employer has the legal right to compel compliance with its policies and they do not conflict with any other law. Under those circumstances, an employer unquestionably has the right to make employment conditional on whatever policies it chooses. When as Leath contends here, however, the new compulsory policy is in conflict with the law protecting his right to seek judicial redress of his statutory rights or to voluntarily waive them, it becomes obvious that an employees' implied or express acceptance of arbitration agreement under threat of termination or denial of employment, by either his signature or by his continuing to work rather then quit after imposition of the agreement, should not bind him to such an agreement. There is nothing to support a claim that such an agreement was entered into voluntarily as clearly intended by Congress in the case of arbitration agreements covering statutory employment rights.

If it is in violation of Title VII, and the like, to force an employee to forego his right to seek enforcement of his statutory rights in court as a condition of employment, then it must also be true that there can not have been any consideration in support of this agreement to arbitrate without some other form of consideration other then his continued employment.

Legal consideration has been defined as something of value given to induce the making of a contract. *Merchants' Nat. Bank v. Boudouris*, 248 S.W. 810, 812 (Civ. App. - Dallas 1923, no writ); *Lemon v. Walker*, 482 S.W.2d 713, 715 (Civ. App. - Amarillo 1972, no writ). Additionally, consideration can be a right, interest, profit, or benefit that accrues to one party, or, alternatively, of a forbearance, loss, or responsibility that is undertaken or incurred by the other party. *Champlin Petroleum Co. v. Pruitt*, 539 S.W.2d 356, 361 (Civ. App. - Fort Worth 1976, ref. n.r.e.); *Lassiter v. Boxwell Brothers, Inc.*, 362 S.W.2d 884, 996 (Civ. App. - Amarillo 1962, no writ). In this case it has been argued that the consideration is Leath's continued employment. It must be remembered, however, that compensation to which one is already entitled cannot constitute consideration under Texas law. *Victoria Bank & Trust Co. v. Brady*, 779 S.W.2d 893, 903 (Civ. App. - _____, 19__). Leath did not obtain any benefit other then that which he already had before the imposition of the arbitration policy, i.e., the right to work until the employer decided to legally terminate him or he decided to quit. If, Leath's employer had in fact provided some other consideration rather then simply offering continued at-will employment, then perhaps it could legitimately be argued there was legal consideration in support of the arbitration agreement. For example, it could

have offered a signing bonus to those employees who chose to agree to arbitration. Additionally, Leath's employer's temporary and unspecified period of forbearance of its right to terminate Leath at will, can not be legal consideration since as previously argued there is no right to withhold employment or to terminate employment in order to compel submission of an employees' statutory rights to arbitration; such would be retaliatory in nature. *See Wells v. Tims*, 275 S.W.2d 468, 471 (Civ. App. - _____, 19__)(forbearance or a promise to forbear the exercise of a right which does not exist, cannot constitute consideration).

Since, an employee's acceptance of employment with discriminatory, or otherwise illegal, conditions would not suffice to show an acceptance by the employee of those discriminatory conditions, or a waiver of the right to timely complain about those conditions in court, and it would clearly be in violation of the very statutes in question for an employer to refuse employment or threaten termination if an employee does not agree to arbitrate his statutory claims rather then litigate, Leath questions how it can be legitimately argued that agreeing to the arbitration agreement or remaining at work rather then quitting constitutes an acceptance on his part. Not only is the contract unenforceable under contract law because there is no consideration, but it is impossible for Leath to agree to a term which is itself discriminatory because it interferes with his statutory right to choose to have the courts redress his statutory claims rather then arbitration. This is not the sort of voluntary agreement to arbitrate Congress has encouraged with respect to Title VII, and which would be enforceable under the Federal Arbitration Act.

If this Court were to determine that an employer may unilaterally force arbitration of an employee's statutory rights,

which are independent and separate from any rights he might have as a result of his employment contract[1], as a condition of employment, there would be nothing to stop all employers from compelling arbitration agreements, and the very important right to a jury trial recently granted by the Civil Rights Act of 1991, 42 U.S.C. Sec. 1977A, would be completely and thoroughly rendered pointless. Likewise the requirement that a contract be entered into voluntarily and knowingly would also be rendered pointless. No employee would be able to work unless it gave up its statutory right to seek redress of its statutory claims in court. There is no reason to believe that Congress intended this result as to Title VII claims when it said, "[w]here appropriate and to the extent authorized by law, the use of alternative dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under the Act or provisions amended by this title." Civil Rights Act of 1991, Pub. L. No. 102-106, Sec. 118, 105 Stat. 1071 (1991). Clearly there is a big difference between encouraging such agreements and forcing such agreements whether desired or not. It would be incongruous for Congress on the one hand to determine it would be better for the furtherance of the purpose of the Civil Rights Act to provide plaintiffs the right to a trial before a jury rather then an experienced judge, and on the other, hold that if it so chooses an employer may force an employee to arbitrate its claims under the threat of losing his job.

It is argued an employer's unilateral requirement that an employee agree to arbitrate his statutory rights, or otherwise waive the right to a jury trial in exchange for employment, is in essence interference with the very same

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1 *See* Alexander, 94 S.Ct. at 1020-1021.

statutory rights sought to be enforced. Just as an employee's employment should be free from the discrimination prohibited by Title VII, his employment should not be made conditional on his giving up his choice as to how those rights should be enforced.

The Supreme Court in *Gilmer* has looked at a similar question in the past. 111 S.Ct. 1647 (1991). In that case the Court determined that despite the apparently conflicting ruling as set forth previously in their ruling in *Alexander, supra*, that a registered securities representative was subject to compulsory arbitration pursuant to an arbitration agreement contained in a securities registration application his employer required he apply for. *Id.* at 1652-1656. The Supreme Court in *Gilmer* concentrated more on the question of whether an employee could voluntarily agree to an arbitration agreement relating to his statutory rights at all, and whether Congress had evidenced any intent to prohibit arbitration agreements in these cases. *Id.* The Supreme Court in *Gilmer* did not specifically address the question of whether compulsary arbitration by an employer as a condition of employment would itself be in violation of the statutory rights of the employee. It focused instead on whether an employee would still be able to pursue enforcement of the statutory rights adequately through arbitration. *Id.* This argument, however, missed altogether Leath's contention that by the very act of compelling waiver of the right to seek redress in court of his statutory rights as a condition for employment, his employer is violating the very statutes which it sought to require arbitration of. There is no voluntary agreement or waiver of that right under these circumstances.

One court, has looked at the matter not from whether the employee's remaining at work after the imposition of the

arbitration agreement is a voluntary acceptance or consideration for the agreement, but from the stand point of whether the right to a jury trial is a procedural right rather then a substantive right. *Cole*, 105 F.3d at 1482. That court determined that an employer could make the compulsory agreement to arbitrate an employee's statutory claims a condition of employment so long as the employee was not required altogether to waive his right to a neutral forum in which to redress his claims. Leath would contend this distinction does not alter his previous arguments. The right to choose to seek to redress one's statutory rights in court is still a protected activity which the employee can only waive voluntarily, and for an employer to decide who gets employment or not on whether that employee agrees to arbitrate, would be in direct violation of the statutes sought to be enforced.

It becomes clear, that an employer may not unilaterally impose on an employee the requirement that he arbitrate his statutory employment rights as a condition of employment without some form of consideration other then the employment itself, even though it might be able to unilaterally impose other policies as a condition of employment. Any arbitration agreement entered into under these conditions would not be supported by consideration and it would not have been voluntarily entered into as intended by Congress. As such, it was an abuse of discretion as a matter of law for the District Court to have determined that there was no evidence of the absence of a voluntary consent to the arbitration agreement. There was in fact in this case no evidence as a matter of law that would support a finding that there was a voluntary consent by Leath to the arbitration clause of his employment contract or that there was legal consideration to support the arbitration agreement. For these

same reasons the Fifth Circuit was in error in affirming the District Court's upholding of the arbitrator's award.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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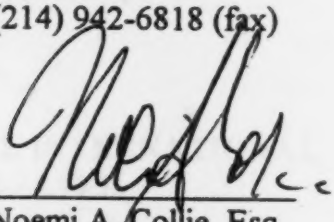

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APPENDIX A - DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS DATED AUGUST 28, 1997

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 97-10202
Summary Calendar

NORMAN LEATH,

Plaintiff-Appellant,

vs.

AMERICAN MEDICAL INTERNATIONAL INCORPORATED,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas (3:95-CV-818-D)

Before SMITH, DUHE, and BARKSDALE, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this

Norman Leath appeals the confirmation of an arbitration award entered in an employment discrimination dispute. Concluding that the arbitration agreement is valid and enforceable, we affirm.

I.

In March 1993, American Medical International Incorporated ("American Medical") required Leath to sign an acknowledgment form containing an arbitration clause (the "Clause") as a condition of his continued employment. The Clause stated, in relevant part:

> I . . . understand that as a condition of employment and continued employment, I agree to submit any complaints to the published process and agree to abide by and accept the final decision of the arbitration panel as ultimate resolution of my complaint(s) for any and all events that arise out of employment or termination of employment.

Leath was discharged in August 1993.

Leath sued American Medical under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Secs. 2000e to 2000e-17; the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. Secs. 621-634; and 42 U.S.C. Sec. 1981, alleging that he was fired because of his race, sex, and age and in retaliation for complaining about American Medical's

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opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

discriminatory practices. Leath and American Medical agreed to submit the claim to arbitration, although Leath reserved the right to challenge the enforceability of the arbitration agreement at a later time.

In December 1996, the arbitrator found, *inter alia*, that American Medical's actions were based on non-discriminatory reasons and denied Leath's claim in its entirety. In January 1997, the district court confirmed the arbitral decision.

II.

Contrary to Leath's assertion, it is well-settled that we review the decision to confirm an arbitral decision *de novo*. *See Gateway Technologies, Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 996 (5th Cir. 1995). Our review of the arbitrator's decision, on the other hand, is extremely differential. *See Executone Info. Sys., Inc. v. Davis*, 26 F.3d 1314, 1320 (5th Cir. 1994).

The Federal Arbitration Act ("FAA"), 9 U.S.C. Secs. 1-16, states that an arbitration provision in "a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. Sec. 2. Parties may agree to arbitrate claims arising under the ADEA, *see Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27-33 (1991), and we have extended this principle to Title VII claims, *see Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir. 1991).

Leath argues that the Clause is unenforceable because it is not supported by consideration. Although Leath admits

that he received continued employment in exchange for agreeing to arbitrate, he argues that this does not qualify as valid consideration.

Under Texas law, the employer and employee have the right to condition continued employment on the modification of the terms of employment. *See Hathaway v. General Mills, Inc.*, 711 S.W.2d 227, 229 (Tex. 1986). That Leath remained an at-will employee is of no moment; he received consideration in the form of continued salary and employment.

Leath argues that this consideration is invalid because the "new policy is itself illegal." This assertion is meritless, as the Supreme Court has held it is legally permissible to require arbitration of statutory rights. *See Gilmer*, 500 U.S. at 26.

B.

Leath also avers that the Clause is unenforceable because it "does not specifically put Leath on notice that he was waiving his right to the judicial remedies provided to redress the violation of his statutory rights." Leath signed an agreement to arbitrate any complaints "for any and all events that arise out of employment or termination of employment." It is obvious that the conduct that forms the basis of his complaint arises out of the "termination of employment."

The notion that an arbitration agreement must state specifically that statutory rights are covered is contrary to precedent. For example, the *Gilmer* court ordered arbitration when the agreement referred, by adoption, to "[a]ny controversy . . . arising out of the employment or termination of employment." 500 U.S. at 23. In fact, we have held that

an employment contract that requires the arbitration of "any action contesting the validity of this Agreement, the enforcement of its financial terms, or other disputes" was sufficient under the FAA. *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 746 (5th Cir. 1996); *see Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 834-35 (8th Cir. 1997)(enforcing an arbitration clause identical to the instant one).

AFFIRMED.

APPENDIX B - MEMORANDUM OPINION AND ORDEROF DISTRICT COURT DATED JANUARY 24, 1997

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

NORMAN H. LEATH,	*	
	*	
Plaintiff,	*	
	*	
VS.	*	**CIVIL ACTION NO.**
	*	**3:95-CV-818-D**
AMERICAN MEDICAL	*	
INTERNATIONAL, INC.,	*	
	*	
Defendant.	*	

MEMORANDUM OPINION AND ORDER

Defendant American Medical International, Inc. ("AMI") moves to confirm an arbitration award entered in an employment discrimination dispute. The court grants the motion and enters judgment in favor of AMI.

Plaintiff Norman H. Leath ("Leath") opposes on various grounds the confirmation of the award dismissing his discrimination claims.[+] His principal contention is that the

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[+] The only ground that the court could not itself address would be a challenge to the entire agreement rather than to the arbitration clause

arbitration clause is unenforceable. Leath has presented no evidence that would support a prima facie case of fraudulent inducement, of the absence of voluntary consent, or of any other fact-based challenge that he makes to the award. His other arguments lack merit as a matter of law.

Accordingly, AMI's motion to confirm is granted. A judgment is filed contemporaneously with this memorandum opinion and order.

SO ORDERED.

January 24, 1997

s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE

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alone. *See, e.g., Shaw v. Walsh Servs., Inc.*, Civil Action No. 3:96-CV-1772-D, slip op. at 2-3 (N.D. Tex. Jan. 22, 1997)(Fitzwater, J); *Satrino v. A. G. Edwards & Sons, Inc.*, 941 F. Supp. 609, 613 (N.D. Tex. 1996)(Fitzwater, J.)(citing *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 749 (5th Cir. 1996)). Although some of plaintiff's reasoning suggests he is attacking the entire agreement, *cf* D. Rep. Br. at 11 & n. 5, it is clear from plaintiff's response that he intends to limit his challenge to the arbitration clause alone. *See* P. Resp. at 4 (stating that plaintiff "does not challenge [ ] the validity or invalidity of his employment contract as a whole"). Therefore, he has waived any right to have the arbitrator address the enforceability of the entire agreement.

APPENDIX C - JUDGMENT OF THE DISTRICT COURT DATED JANUARY 24, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NORMAN H. LEATH,	*	
	*	
Plaintiff,	*	
	*	
VS.	*	**CIVIL ACTION NO.**
	*	**3:95-CV-818-D**
AMERICAN MEDICAL	*	
INTERNATIONAL, INC.,	*	
	*	
Defendant.	*	

JUDGMENT

For the reasons set out in memorandum opinion and order filed today, it is ordered and adjudged that the December 5, 1996 award of the American Arbitration Association in *Norman H. Leath v. American Medical International, Inc.*, No. 71 160 00008 96, is confirmed, and plaintiff's action against defendant is dismissed with prejudice.

Taxable costs of court, as calculated by the clerk of the court, are assessed against plaintiff.

Done at Dallas, Texas this 24th day of January, 1997.

s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
JAN 30 1998
CLERK

(2)

No. 97-908

In The

Supreme Court of the United States

October Term, 1997

NORMAN H. LEATH,

Petitioner,

vs.

AMERICAN MEDICAL INTERNATIONAL, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Courts of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is an arbitration agreement between an employer and an at-will employee which encompasses statutory claims, like Title VII and Section 1981, unenforceable because it constitutes a waiver of the employee's substantive rights under those statutes?

STATEMENT PURSUANT TO RULE 29.6

American Medical International, Inc.'s name was changed on November 21, 1995 to Tenet HealthSystem Medical, Inc. Tenet HealthSystem Medical, Inc. is owned by Tenet HealthSystems Holding, Inc. The parent corporation of Tenet HealthSystems Holding, Inc. is Tenet Healthcare Corporation. Respondent has no nonwholly owned subsidiaries.

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OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is accurately set forth in Appendix A to the Petition for Writ of Certiorari ("Petition"). The opinion and judgment of the district court are accurately set forth in Appendices B and C of the Petition.[1]

STATUTE INVOLVED

The Federal Arbitration Act ("FAA") is applicable as follows:

> [A] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

CONCISE STATEMENT OF THE CASE

A. Statement of Facts

On March 22, 1993, Petitioner, Norman Leath ("Leath") signed a form on which he agreed to arbitrate any disputes arising out of his employment or the termination of his employment. (R. at 21).[2] Specifically, the agreement contained the following language:

---

1. References to the Appendices of the Petition are abbreviated "App. __."

2. References to the district court record are abbreviated "R. at __."

> I understand AMI makes available arbitration for resolution of grievances. I also understand that as a condition of employment and continued employment, I agree to submit any complaints to the published process and agree to abide by and accept the **final decision** of the arbitration panel as ultimate resolution of my complaint(s) for any and all events that arise out of employment or termination of employment.

(R. at 21). In March 1993, American Medical International, Inc. ("AMI") notified Leath that because of the company's reorganization, AMI was eliminating his position. (R. at 79-80). Leath was officially discharged on August 29, 1993. (R. at 6).

B. Course of Proceedings Below

Despite his agreement to arbitrate all claims, Leath filed a lawsuit in which he alleged statutory claims related to the termination of his employment under 42 U.S.C. § 2000e *et seq.* ("Title VII") and 42 U.S.C. § 1981 ("Section 1981"). (R. at 1). AMI answered, asserting that Leath's claims were subject to the parties' prior agreement to arbitrate all claims related to his employment or the termination of his employment. (R. at 13). Pursuant to the parties' agreed motion, the district court stayed proceedings pending arbitration. (R. at 18-22). The parties jointly selected an Arbitrator who concluded that Leath's claims were time-barred and that Leath failed to present evidence that AMI had discriminated against him. (R. at 27). Therefore, the Arbitrator denied Leath's claims in their entirety. (R. at 28). AMI moved to confirm this award. (R. at 24-26). Leath opposed this confirmation, arguing that the arbitration agreement was unenforceable. (R. at 32-47). AMI filed a Reply to this Response. (R. at 48-82). The district court was not persuaded by Leath's arguments and, consequently, confirmed the arbitration award and dismissed

Leath's claims with prejudice. (R. at 83-85). The district court held that Leath had "presented no evidence that would support a prima facie case of fraudulent inducement, of the absence of voluntary consent, or of any other fact-based challenge that he makes to the award." (App. B).

Leath appealed to the Fifth Circuit. (R. at 86). The Fifth Circuit upheld the district court in a brief opinion which it deemed not worthy of publication because of its limited precedential value. (App. A). The Fifth Circuit held that the district court had appropriately applied the analysis outlined by this Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), and that Leath's arguments to the contrary lacked merit. (App. A).

REASONS FOR DENYING THE WRIT

I.

NO COMPELLING REASONS EXIST FOR GRANTING LEATH'S PETITION.

There are no "compelling" reasons for reviewing the Fifth Circuit's opinion in this case. SUP. CT. R. 10. The district court's decision enforcing the arbitration agreement between Leath and AMI and the Fifth Circuit's opinion upholding that decision are clear applications of well settled law. *See Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20 (1991). Leath can not, and does not, present any law or persuasive argument to counter this conclusion. Rather, Leath argues that because arbitration of statutory claims constitutes a waiver of substantive rights, the Court could not have intended for *Gilmer* to support the application of Texas state contract law to arbitration agreements encompassing potential statutory claims. More specifically, although Leath acknowledges that future or continued employment can serve as the consideration to support "most unilaterally imposed policies,"

he asserts that Congress and this Court could not have intended for this consideration to support an arbitration agreement. Leath's argument misconstrues Supreme Court precedent which has held that statutory claims are arbitrable and that courts should apply general contract principles to these agreements. *Id.* By asking the Court to now rule that continued employment is insufficient consideration for an arbitration agreement, Leath asks the Court to depart from *Gilmer* and its progeny and create a new body of contract law specific to arbitration agreements. Because Leath has not presented any compelling reasons why the Court should reconsider *Gilmer*, the Court should deny the Petition.

II.

AN ARBITRATION AGREEMENT WHICH ENCOMPASSES STATUTORY CLAIMS DOES NOT CONSTITUTE A WAIVER OF SUBSTANTIVE RIGHTS.

Leath justifies his argument that arbitration agreements which encompass statutory claims need more consideration than other employment contracts by implying that arbitration of these claims constitutes a waiver of substantive rights protected by those statutes:

> Leath would contend that an employer can not unilaterally impose an arbitration agreement covering the employee's statutory rights as a condition of employment because it would be illegal retaliation under Title VII, and the like for it to terminate an employee who refused to agree to arbitrate his statutory rights as a condition to his employment. The right to seek relief for the violation of a statutory employment claim through the judicial system should itself be considered a protected activity under Title VII, and the like.

(Pet. at 8).[3] Leath's argument falls in the treads of well settled principles governing arbitration agreements. In *Gilmer*, the Court considered an employee's attack on a virtually identical arbitration agreement to the one at issue in this case. *Id.* at 23. Like the arbitration agreement which Leath signed, Gilmer signed an agreement encompassing any controversy "arising out of the employment or termination of employment" of the employee. *Id.* The district court found, as Leath asks the Court to find, that Congress did not intend for ADEA claimants to waive their right to a judicial forum. *Id.* at 24. In holding that the district court applied the wrong analysis, the Court emphasized that public policy strongly favors arbitration. *Id.* at 25; *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 at 22 n.7 and 24 (1983). In fact, the Court cautioned that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Gilmer*, 500 U.S. at 26; *see also Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24. The Court then explained its disagreement with Gilmer's argument, remarking that:

> [B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.

Gilmer, 500 U.S. at 26; *see also Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 880 (4th Cir.), *cert. denied*, 117 S. Ct. 432 (1996). This passage reflects the "futility" of Leath's argument. *Kelly v. UHC Management Co.*, 967 F. Supp. 1240, 1257 (N.D. Ala. 1997). Leath is not, as he implies, giving up any substantive rights under Title VII or Section 1981. Leath's attack "rest[s] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants," and consequently is "far out of step

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3. References to the Petition are abbreviated "Pet. __."

with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Gilmer*, 500 U.S. at 30.

Although arbitration of Leath's statutory claims does not by itself warrant any different analysis of the statute, Leath can avoid arbitration of his claims if he carries his burden to show that Congress "evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Gilmer*, 500 U.S. at 26; *see also Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 308 (6th Cir. 1991). Leath has not pointed to any section in either Title VII or Section 1981 which evidences this kind of intent and, therefore, has not satisfied his burden. In fact, Title VII and Section 1981 evidence Congressional favor towards arbitration agreements. The Civil Rights Act of 1991, amending both Title VII and Section 1981, states:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under the Acts or provision of federal law amended by this title.

Pub. L. 102-166, § 118; *see also Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir. 1997). As the Fourth Circuit observed, "[t]he meaning of this language is plain — Congress is in favor of arbitration." *Austin*, 78 F.3d at 881. The conclusion that Title VII and Section 1981 do not evidence a Congressional intent to preclude waiver of arbitration is further supported by the myriad of cases reaching this conclusion. The courts from virtually every Circuit have consistently found that nothing in Title VII demonstrates a Congressional intent to preclude arbitration and, therefore, based on *Gilmer*, these courts have enforced anticipatory agreements to arbitrate. *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 838 (8th Cir. 1997);[4]

4. *Patterson* actually upheld the enforceability of the exact same arbitration agreement which Leath signed.

Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1482-83 (D.C. Cir. 1997); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 882 (4th Cir.), *cert. denied*, 117 S. Ct. 432 (1996); *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1487 (10th Cir. 1994); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 700 (11th Cir. 1992) (per curiam); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932, 935 (9th Cir. 1992); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 312 (6th Cir. 1991); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir. 1991); *Herko v. Metropolitan Life Ins.* Co., 978 F. Supp. 141, 147 (W.D.N.Y. 1997).

Leath's own analogy to types of employment agreements which would affect an employee's substantive rights reveals the inaccuracy of his analysis. Leath compares an arbitration agreement to an agreement that an employee work for less than minimum wage, work under unsafe conditions or submit to discriminatory practices. (Pet. at 8). AMI agrees that an employer would violate the law by entering into an agreement with its employees concerning these three conditions of employment, irrespective of whether the employer specifically made the agreement a condition of continued employment. The difference between these examples and an arbitration agreement, however, is patently obvious. Forcing an employee to work for less than minimum wage violates the Fair Labor Standards Act. Placing an employee in an unsafe working environment violates the Occupational Safety and Health Act. Requiring that an employee submit to discriminatory practices violates Title VII. Thus, Leath is correct that an agreement in which an employee purported to give up his substantive rights under these statutes would violate the law and be unenforceable. *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997). Leath is incorrect, however, in asserting that these agreements are analogous to an arbitration agreement which, as the Supreme Court in *Gilmer* made clear, does not affect the substantive rights of the employee. 500 U.S. at 26. In fact, contracts to arbitrate are

encouraged and further the goals of the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* Consequently, the district court and Fifth Circuit applied the correct analysis in determining that the arbitration agreement between Leath and AMI is enforceable and Leath has not presented any arguments which justify the Court's granting the Petition to reconsider this analysis. The Petition should be denied.

III.

ANALYZED UNDER WELL ESTABLISHED CONTRACT PRINCIPLES, THE AGREEMENT BETWEEN LEATH AND AMI IS SUPPORTED BY CONSIDERATION.

Based on the incorrect presumption that arbitration agreements affect an employee's substantive rights, Leath argues that these agreements must be analyzed differently than other contracts. Thus, although Leath "concedes" that future employment or continued employment would constitute sufficient consideration for other employment agreements, he asserts that it is insufficient to support an arbitration agreement. (Pet. at 7). Leath's concession shatters his argument. The Federal Arbitration Act intends for courts "to place arbitration agreements on the same footing as other contracts." *Gilmer*, 500 U.S. at 33. Thus, the courts must analyze the enforceability of the arbitration agreement between Leath and AMI under general contract principles. In other words, the fact that the agreement involves arbitration should in no way alter or impact the court's application of Texas contract law. Considering the agreement under this appropriate analytical framework, Leath's admission that, under Texas law, employment contracts can be supported by continued employment confirms that the district court and Fifth Circuit correctly applied the law. *See, e.g., Hathaway v. General Mills, Inc.*, 711 S.W.2d 227, 229 (Tex. 1986); *Gamble v. Gregg County*, 932 S.W.2d 253, 256 (Tex. App.—Texarkana

1996, no writ); *Adams v. Valley Fed. Credit Union*, 848 S.W.2d 182, 189 (Tex. App.—Corpus Christi 1992, writ denied); *Jennings v. Minco Tech. Labs, Inc.*, 765 S.W.2d 497, 499 (Tex. App.—Austin 1989, writ denied); *Texas Employment Comm'n v. Hughes Drilling Fluids*, 746 S.W.2d 796, 799-800, n.5 (Tex. App.—Tyler 1988, writ denied).[5] In fact, at least two Texas courts have specifically found that continued employment is sufficient consideration to support an arbitration agreement. *Circuit City Stores, Inc. v. Curry*, 946 S.W.2d 486, 488 (Tex. App.—Fort Worth 1997, orig. proceeding); *Burlington N. R.R. v. Akpan*, 943 S.W.2d 48, 52 (Tex. App.—Fort Worth 1996, no writ). Perhaps a different issue might exist if Texas' acceptance of future or continued employment as consideration for agreements constituted a departure from general contract principles accepted in other forums. However, as Leath admits, federal courts outside of Texas have construed other states' contract laws to likewise allow future or continued employment to serve as the consideration for an agreement to arbitrate. *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 229-30 (3rd Cir.), *cert. denied*, 118 S. Ct. 299 (1997); *Cole v. Burns Int'l Sec. Servs*, 105 F.3d 1465, 1482 (D.C. Cir. 1997); *Reese v. Commercial Credit Corp.*, 955 F. Supp. 567, 570 (D.S.C. 1997); *Lang v. Burlington N. R.R. Co.*, 835 F. Supp. 1104, 1106 (D. Minn. 1993). (Pet. at 7). Because the district court and Fifth Circuit applied these well settled contract principles, this Court should deny the Petition.

Leath attempts to escape the application of these principles by arguing that an arbitration agreement between an employer and

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5. In *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 275 (4th Cir. 1997), the court considered and found that the exact same agreement which Leath signed was supported by adequate consideration in the form of the parties' mutual agreement to arbitrate. Accordingly, in addition to Leath's continued employment, the arbitration agreement between the parties is supported by AMI's own agreement to submit to arbitration of disputes.

employee by its very nature is not "voluntary" because the parties have unequal bargaining power. (Pet. at 12). Again, Leath's position contradicts the established law. The courts have consistently found that an arbitration agreement between an employer and employee is not unenforceable merely because the parties have unequal bargaining power. *Gilmer*, 500 U.S. at 33; *Great W. Mortgage Corp.*, 110 F.3d at 229; *Johnson v. Hubbard Broad., Inc.*, 940 F. Supp. 1447, 1456 (D. Minn. 1996); *Lang v. Burlington N. R.R. Co.*, 835 F. Supp. 1104, 1106 (D. Minn. 1993); *Hampton v. ITT Corp.*, 829 F. Supp. 202, 204 (S.D. Tex. 1993). AMI does not dispute that, in some circumstances, an agreement could "result [ ] from the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract." *Gilmer,* 500 U.S. at 25. However, Leath does not allege any facts which would place his agreement with AMI in this different analytical setting. *Kelly v. UHC Management Co.*, 967 F. Supp. 1240, 1258 (N.D. Ala. 1997). Leath does not allege that he was coerced, misled or pressured into signing the arbitration agreement. *Ludwig v. Equitable Life Assurance Soc'y*, 978 F. Supp. 1379, 1381 (D. Kan. 1997). He does not even allege that he did not read the agreement or that he was not given time to read the agreement. *Kelly*, 967 F. Supp. at 1258. The arbitration agreement specifically stated that it was conditioned upon employment or continued employment and Leath signed that agreement. (R. at 21). Because Leath has presented no facts which distinguish this case from *Gilmer* or justify a departure from that opinion, this Court should deny the Petition.

Narrowed down to its central theme, the Petition reflects a general distrust of arbitration agreements. Congress enacted the Federal Arbitration Act for the purpose of eradicating the type of distrust of arbitration that Leath asks the Court to apply. *Allied-Bruce Terminex Co., Inc. v. Dobson*, 513 U.S. 265, 270-71 (1995); *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford*

Junior Univ., 489 U.S. 468, 474 (1989). Furthermore, *Gilmer* necessarily rejected the types of broad public policy arguments against arbitration which Leath re-presents to the Court. *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir. 1997); *Alford v. Dean Witter Reynold, Inc.*, 939 F.2d 229, 230. The Court has previously considered the arguments presented in the Petition and the courts, including the district court and Fifth Circuit in this case, have appropriately applied the law. The Petition should be denied.

CONCLUSION

The Petition presents an attempt to reargue *Gilmer*. Because the Petition is devoid of any reasons justifying reconsideration of this case or the principles articulated therein, the Petition should be denied.

Respectfully submitted,

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